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No. 85-144

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN D. MOSS, JR., ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Commissioner v. *Heininger*, 320 U.S. 467 ..... 4, 5

Commissioner v. *Lincoln Electric Co.*, 176 F.2d 815, cert. denied, 338 U.S. 949 5

Cooper v. *Commissioner*, 611 F.2d 1260 5

Sibla v. *Commissioner*, 611 F.2d 1260 5

Statute and regulations:

Internal Revenue Code of 1954 (26 U.S.C.):

§ 162(a) 2

§ 262 2

Treas. Reg. :

§ 1.162-5 5

§ 1.262-1(b)(5) 2, 4

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Petitioner challenges the court of appeals' holding that he was not entitled to a tax deduction for the cost of eating lunch daily. The decision below is correct, the question is factual, and there is no conflict among the circuits or other consideration warranting this Court's review.

1. Petitioner John D. Moss, Jr., is a partner in a Chicago law firm.[1] The firm, which consisted of four partners and four associates, followed the practice of meeting for lunch each working day at a restaurant (Pet. App. B4). Petitioner and his colleagues generally discussed firm business while eating lunch. Attendance was not mandatory, but the lawyers generally attended whenever possible for as long as

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[1]Petitioner Diane C. Moss is a party solely by virtue of having filed a joint federal income tax return with her husband for the tax years at issue.

possible (*ibid.*). Sometimes they would not actually have lunch but merely join in the discussion (*ibid.*).

The firm paid the restaurant bills thus incurred. For federal tax purposes, the firm deducted those costs on its partnership tax return as an expense of "meetings and conferences" (*id.* at B2). Petitioner in turn deducted his distributive share of the aggregate annual lunch bill as an "ordinary and necessary expense[] paid or incurred * * * in carrying on any trade or business" under Section 162(a) of the Code.[2]

The Commissioner on audit of petitioner's 1976-1977 tax returns disallowed the claimed deductions. Section 262 of the Code, he noted, provides that "no deduction shall be allowed for personal, living, or family expenses," and the regulations generally provide that "the costs of [a] taxpayer's meals not incurred in traveling away from home are personal expenses" (Treas. Reg. § 1.262-1(b)(5)). In the Commissioner's view, petitioner's daily cost of lunch resembled costs incurred by a taxpayer in commuting to work—costs which, despite their arguable business nexus, nevertheless "are personal expenses and do not qualify as deductible expenses." Treas. Reg. § 1.262-1(b)(5).

Petitioner sought redetermination of the resulting deficiencies in the Tax Court, which, in a reviewed opinion, unanimously upheld the Commissioner's position (Pet. App. B1-B21). The court observed that "[t]he boundary line dividing personal expenses from business expenses [is] often obscurely marked" and that "[t]he taxpayer bears the burden [of proof] in these skirmishes" (Pet. App. B8-B9). In holding that petitioner's lunch costs "f[e]ll on the nondeductible side" of the line, the court noted that these

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[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the tax years at issue (the Code or I.R.C.).

expenses reflected, not "occasional luncheon meeting[s]," but "[d]aily meals" which, as "an inherently personal expense," a taxpayer "bears a heavy burden in proving * * * routinely deductible" (*id.* at B13-B14). The court also noted that petitioner's presence at the restaurant was voluntary; he was neither "required to participate" in the meals "nor was he forced to pay for meals he did not eat" (*id.* at B14-B16 & n.12). "On the contrary," the court noted, "petitioner is much like employees in all fields who find it necessary to devote their lunch hour to work-related activities" (*id.* at B18). People often feel constrained to eat lunch at their desks; if that were sufficient to "convert the cost of daily meals into a business expense to be shared by the Government," the Tax Court observed, "only the unimaginative would dine at their own expense" (*id.* at B17, B20 (footnote omitted)). Nine judges concurred, noting their agreement with "the result in this particular case," but expressing the view that the court's opinion did not "disallow[] the costs of meals in all instances where only partners, co-workers, etc. are involved" (*id.* at B21).

The court of appeals unanimously affirmed (Pet. App. A1-A6). In addition to the facts cited by the Tax Court, the court of appeals emphasized that petitioner's meals differed from the typical "business lunch" in that "all the participants in the meal [were] coworkers" (*id.* at A4). Whereas a large law firm might properly deduct the cost of "a monthly lunch to allow partners to get to know associates," petitioner's firm "never had more than eight lawyers * * * and did not need a daily lunch to cement relationships among them" (*id.* at A5). The court noted that "[t]he case might be different" if different facts were involved (*id.* at A5-A6), but held that the Commissioner had properly disallowed the deductions on the facts presented.

2. The decisions below are correct. As the court of appeals noted, the question whether the cost of a meal represents an ordinary and necessary business expense rather than a nondeductible personal expenditure "is all a matter of degree and circumstance" (Pet. App. A5). In holding that personal preferences predominated here, the courts below properly relied on three principal facts: the frequency of the meals, which were "consumed 5 days per week, 52 weeks per year" (Pet. App. A5, B14); the absence of employer-imposed restrictions, which left petitioner and his colleagues free to eat or not to eat and in any event to "pick[] the restaurant they liked most" (*id.* at A5-A6, B16-B17); and the fact that all the diners were co-workers, which meant that the cost of the meals, as distinguished from the conversation, had no obvious "business" connection, lacking the "social lubrication" rationale that justifies a business-expense deduction for certain meals consumed with clients and other outsiders (*id.* at A4-A5).

In thus balancing the facts, the courts below reached a result consistent not only with the statute and the regulations but also with common sense. The cost of commuting to work every day would not become deductible merely because one happened to think about work, or to talk to one's car-pool companions about work, on the way to the office. See Treas. Reg. § 1.262-1(b)(5). Equally obviously, the cost of "daily sustenance" (Pet. App. B13) does not become deductible simply because people contrive to "arrange their work schedules so they do some of their work at lunch" (*id.* at A3). The question in any event is factual and merits no further review.[3]

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[3]Contrary to petitioner's contention (Pet. 14, 22), the decision below does not conflict with *Commissioner* v. *Heininger*, 320 U.S. 467 (1943). This Court there upheld the deductibility of legal expenses incurred by a taxpayer "to defend his business from threatened destruction" stemming from allegations that he had made false representations through

3. Petitioner alternatively contends, seemingly as an afterthought (Pet. i, 40-42), that he is entitled to deduct the cost of his lunch as an "educational expense." See generally Treas. Reg. § 1.162-5. The Tax Court succinctly rejected this argument (Pet. App. B20-B21). It found "no cases supporting a deduction for informal training of the type that occurred here" and it held that "combining nourishment with enlightenment does not make the nourishment deductible" (*ibid.*). The court of appeals did not expressly consider this argument, evidently believing it frivolous, which it is.[4]

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the mail (320 U.S. at 471); obviously, the Court in that case had no occasion to address the deductibility of routine daily expenditures incurred primarily for personal reasons. Equally mistaken is petitioner's contention (Pet. 14, 20-21, 26-27) that the decision below conflicts with *Commissioner* v. *Lincoln Electric Co.*, 176 F.2d 815 (6th Cir. 1949), cert. denied, 338 U.S. 949 (1950), and with the companion cases of *Sibla* v. *Commissioner* and *Cooper* v. *Commissioner*, 611 F.2d 1260 (9th Cir. 1980). In the former case, the Sixth Circuit held that the reasonableness, and hence the deductibility, of an employer's payments to an employee retirement plan was "a question of fact for determination in the first instance by the Tax Court" (176 F.2d at 818). In the latter cases, the Ninth Circuit upheld the deduction by firemen of contributions they were required to make to "a mandatory organized mess at the firehouse where they were stationed," contributions that were required regardless of whether they ate the meals or were present at the fire station when the meals were consumed (611 F.2d at 1261). As the Tax Court observed below, later decisions "have effectively confined that holding to its facts" (Pet. App. B15 n.12). In any event, the Tax Court correctly distinguished those cases from this one, since petitioner "was not required to participate" in the law firm's meals and was not "forced to pay for meals he did not eat" (*ibid.*).

[4]Petitioner suggests at one point (Pet. 35-36) that, even if he cannot deduct the cost of his own meals as a business or educational expense, he should be entitled to deduct that portion of his distributive share of the partnership lunch bill which represented meals consumed by the firm's associates. Petitioner did not make this argument below, presumably because it would entail taxation of the lunches' value to the associates as additional salary income (see Pet. App. B20 n.13), and neither court below accordingly considered it. As the Tax Court noted, (*ibid.*), moreover, this argument is not properly presented on the record

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1985

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of this case, since petitioner introduced no evidence supporting an allocation of lunch costs based on the partners' and the associates' respective gustatory habits.